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12/05/2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

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December 2, 2016

Mr. Ed Smith, Clerk of the Montana Supreme Court
215 N. Sanders, Room 323
P.O. Box 203003
Helena, MT 59620-3003

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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Re: Proposed Rule 8.4(g)

Dear Mr. Smith and Honorable Members of the Montana Supreme Court:

I am writing in opposition to the addition of Proposed Rule 8.4(g) to the Montana Rules of Professional Conduct. The Montana Supreme Court has not articulated any reason why this rule is necessary, nor has it identified any problems that are not already adequately addressed by the application of the existing Rules of Professional Conduct and current state and federal laws prohibiting unlawful discrimination and harassment.

Rule 8.4(g) adds as actionable "professional misconduct"

conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

This goes far beyond the scope of other types of conduct governed by the Rules of Professional Conduct, which are intended to regulate an attorney's competence and ethical conduct in the representation of clients, in judicial proceedings, in relationships with opposing parties and their counsel, and in serving as a third party neutral. This Rule extends into activities that have no bearing on these matters. Instead, it exposes attorneys to disciplinary action for conduct that is not unlawful, not prejudicial to the administration of justice, and irrelevant to a lawyer's competence, ethics, or fitness.

ABA Comment 3 to Rule 8.4(g)¹ broadly describes "discrimination" to include "harmful verbal or physical conduct that manifests bias or prejudice towards others." This definition and the

¹ Although proposed Rule 8.4(g) does not incorporate the Comments, the Montana Supreme Court often relies on ABA Comments in interpreting those Montana Rules of Professional Conduct that are substantially similar to their ABA counterparts. See, e.g., *In re Potts*, 2007 MT 81 (relying upon ABA Comments in the Court's analysis).

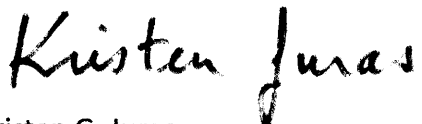
proposed Rule ignore the fact that Montana and federal laws protect many forms of conduct or speech that may “manifest bias” or offend others. For example, the First Amendment protects the right of churches to hire only men as priests or pastors based on the church’s religious doctrines – a policy that discriminates against women. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 131 S. Ct. 1783 (2011). Yet a lawyer serving on the church’s board who participates in such discussions and decisions may nonetheless be subject to disciplinary action under Rule 8.4(g).

If topics such as Sharia law or transgender bathroom policies come up at a State Bar dinner, an attorney with views that may be considered “discriminatory” or “biased” will have the choice of either remaining silent or taking the risk that she will be subject to disciplinary action if she joins the conversation. It doesn’t take much imagination to anticipate the chilling effect Rule 8.4(g) will have on the free discussion amongst attorneys on a wide variety of issues. Who, for example, would want to present the “unpopular” side of a controversial topic at a CLE presentation when such comments may be subject to disciplinary action?

While Rule 8.4(g) states that it “does not preclude legitimate advice or advocacy consistent with these rules,” that statement is circular. If conduct is considered discriminatory or harassing as those terms are defined, it will not be “consistent with these rules” and thus conduct and comments will not be protected even when undertaken in the course of representing a client. Indeed, Comment 4 to ABA Rule 8.4(g) includes “representing clients” in the definition of “conduct related to the practice of law.” At the very least, this circular definition is going to generate much confusion and uncertainty for lawyers attempting to comply with Rule 8.4(g).

Rule 8.4(g) will further silence, if not totally mute, the already quiet voices of the members of the Montana State Bar whose personal beliefs don’t always align with the majority or “politically correct” view. In view of the lack of any substantiated need for Rule 8.4(g) and considering the chilling effect that its vague standards and overly broad scope will have on a lawyer’s freedom to make comments and give advice in a wide variety of contexts, this Rule should not be adopted.

Sincerely,

A handwritten signature in black ink that reads "Kristen Juras". The signature is written in a cursive, flowing style.

Kristen G. Juras